

Filed for intro on 02/15/95  
House Bill \_\_\_\_\_  
By \_\_\_\_\_

Senate No. SB1510  
By Gilbert

AN ACT relative to hazardous waste management and  
underground storage facilities and to amend Tennessee  
Code Annotated, Title 68.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Tennessee Code Annotated, Section 68-212-202(4)(E), is amended by  
adding the following as a new subsection (ii) and redesignating all subsequent subsections  
accordingly:

"(ii) A liable party, as provided for in part four of this chapter, does not include a  
person who, without participating in the management of the hazardous substance site,  
holds indicia of ownership primarily to protect a security interest in the site,"

SECTION 2. Tennessee Code Annotated, Section 68-212-202 (4), is amended by  
adding the following as a new subsection (F) and by redesignating all subsequent subsections  
accordingly:

"(F)(i) The term "owner or operator" does not include a person who establishes,  
by a preponderance of the evidence, that (1) he or she acquired the title to the  
hazardous substance site after the disposal or placement of the hazardous substance

on, in, or at the site, (2) at the time the person acquired title to the hazardous substance site, he or she did not know and had no reason to know that any hazardous substance which is subject to release was disposed of on, in, or at the site, and (3) the person exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances;

(ii) To establish that he or she had no reason to know, as provided in subdivision (4)(F)(i), the person must have undertaken, at the time of acquisition, all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice in an effort to minimize liability . For purposes of the preceding sentence, the court or presiding authority shall take into account any specialized knowledge or experience on the part of the defendant, the relationship of the purchase price to the value of the property if uncontaminated, commonly known or reasonably ascertainable information about the property, the obviousness of the presence or likely presence of contamination at the property, and the ability to detect such contamination by appropriate inspection. The good faith performance of a Transaction Screen Process in material compliance with the version of the ASTM Practice E 1528 in effect at the time of the acquisition, or any successive replacement standard, or a Phase I Environmental Site Assessment in substantial and material compliance with the version of the ASTM E-1527 Guideline for Environmental Site Assessments in effect at the time of acquisition, or any successive replacement standard (collectively the "Assessment Standard"), that appropriately concludes that no further investigation is required shall create a presumption that the person ordering or authorized to use the Transaction Screen Process or the Phase I Environmental Site Assessment has conducted "all appropriate inquiry" under this subdivision."

SECTION 3. Tennessee Code Annotated, Section 68-212, is amended by adding the following sections 4 thru 9 as a new part four.

SECTION 4. Definitions.-As used in this chapter, unless the context otherwise requires:

(1)"Active participation in the management" or "participation in the management" or "participate in the management" means actual participation in the management or operational affairs by the holder of the security interest and shall not include the mere capacity, or ability to influence, or the unexercised right to control a site, vessel or facility operations.

(A) A holder of a security interest shall be considered to be an active participant in the management, while the borrower is still in possession, only if the holder either:

(i) Exercises decision making control over the borrower's environmental compliance, such that the holder has undertaken responsibility for the borrower's disposal or hazardous substance handling practices; or

(ii) Exercises control at a level comparable to that of a manager of the borrower's enterprise, such that the holder has assumed or manifested responsibility for the overall management of the enterprise encompassing day-to-day decision making of the enterprise with respect to:

(1) Environmental compliance; or

(2) All, or substantially all, of the operational (as opposed to financial or administrative) aspects of the enterprise other than environmental compliance. Operational aspects of the enterprise include functions such as that of facility or plant manager, operations manager, chief operating officer, or chief executive

officer. Financial or administrative aspects include functions such as that of credit manager, accounts payable or receivable manager, or both, personnel manager, controller, chief financial officer, or similar functions;

(B) No act or admission prior to the time that indicia of ownership are held primarily to protect a security interest constitutes evidence of participation in management. A prospective holder who undertakes or requires an environmental inspection of the site, vessel or facility in which indicia of ownership are to be held, or requires a prospective borrower to clean up a site, vessel or facility or to comply or come into compliance (whether prior or subsequent to the time that indicia of ownership are held primarily to protect a security interest) with any applicable law or regulation, is not by such action considered to be participating in the site's, vessel's or facility's management, provided however, that a holder shall not be required to conduct or require an inspection to qualify for the protection for holders granted pursuant to this chapter, and the liability of a holder shall not be based on or affected by the holder not conducting or not requiring an inspection;

(C) Actions that are consistent with holding indicia of ownership primarily to protect a security interest do not constitute participation in management for the purposes of this chapter. The authority for the holder to take such actions may, but need not, be contained in contractual or other documents specifying requirements for financial, environmental, and other warranties, covenants, conditions, representations or promises from the borrower. Loan policing and work out activities cover and include all activities up to foreclosure and its equivalents;

(i) A holder who engages in policing activities prior to foreclosure shall remain within the exemption provided that the holder does not by such actions participate in the management of the site, vessel or facility. Such actions include, but are not limited to, requiring the borrower to clean up the site, vessel or facility during the term of the security interest; requiring the borrower to comply or come into compliance with applicable federal, state, and local environmental and other laws, rules and regulations during the term of the security interest; securing or exercising authority to monitor or inspect the site, vessel or facility (including on-site inspections) in which indicia of ownership are maintained, or the borrower's business or financial conditions during the term of the security interest; or taking other actions to adequately police the loan or security interest (such as requiring a borrower to comply with any warranties, covenants, conditions, representations or promises from the borrower);

(ii) A holder who engages in work out activities prior to foreclosure and its equivalents shall remain within the exemption provided that the holder does not by such action participate in the management of the site, vessel or facility. For purposes of this act, "work out" refers to those actions by which a holder, at any time prior to foreclosure and its equivalents, seeks to: prevent, cure, or mitigate a default by the borrower or obligor; or preserve or prevent the diminution of the value of the security . Work out activities, include but are not limited to: restructuring or renegotiating the terms of the security interest; requiring payment

of additional rent or interest; exercising forbearance; requiring or exercising rights pursuant to an assignment of accounts or other amounts owing to an obligor; requiring or exercising rights pursuant to an escrow agreement pertaining to amounts owing to an obligor; providing specific or general financial or other advice, suggestions, counseling, or guidance; and exercising any right or remedy the holder is entitled to by law or under any warranties, covenants, conditions, representations or promises from the borrower;

(D) A holder does not participate in the management of a site, vessel or facility by making any response to or performing any response action or undertaking any clean up or removal or similar actions under the federal "Comprehensive Environmental Response, Compensation, and Liability Act of 1980," 42 U.S.C. Section 9601 et seq., or any other local, state or federal environmental laws or regulations.

(2) "Borrower", "debtor", or "obligor" is a person whose site, vessel or facility is encumbered by a security interest. These terms are used interchangeably;

(3) "Date of foreclosure" means the date on which the holder obtains legal or equitable title or possession to the site, vessel or facility pursuant to or incident to foreclosure;

(4) "Department" means the Tennessee Department of Environment and Conservation;

(5) "Facility" means (a) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling

stock, or aircraft, or (b) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located;

(6) "Fair consideration" means the value of the security interest when calculated as an amount equal to or in excess of the sum of the outstanding principal (or comparable amount in the case of a lease that constitutes a security interest) owed to the holder immediately preceding the acquisition of full title (or possession in the case of property subject to a lease financing transaction) pursuant to foreclosure and its equivalents, plus any unpaid interest, rent or penalties (whether arising before or after foreclosure and its equivalents), plus all reasonable and necessary costs, fees, or other charges incurred by the holder incident to work out, foreclosure and its equivalents, retention, maintaining the business activities of the enterprise, preserving, protecting and preparing the site, vessel or facility prior to sale, re-lease of property held pursuant to a lease financing transaction (whether by a new lease financing transaction or substitution of the lessee) or other disposition, plus response costs incurred under applicable federal, state or local environmental cleanup laws or regulations, or at the direction of an on-scene coordinator, less any amounts received by the holder in connection with a partial disposition of the property, net revenues received as a result of maintaining the business activities of the enterprise, and any amounts paid by the borrower subsequent to the acquisition of full title (or possession in the case of properties subject to lease financing transactions) pursuant to foreclosure and its equivalents. In the case of a holder maintaining an indicia of ownership primarily to protect a junior security interest, fair consideration is the value of all outstanding higher priority security interests plus the value of the security interest held by the junior holder, each calculated as set forth in this definition;

(7) "Foreclosure" or "foreclosure and its equivalents" means purchase at foreclosure sale; acquisition or assignment of title in lieu of foreclosure; termination of a

lease or other repossession; acquisition of a right to title or possession; an agreement in satisfaction of the obligation; or any other formal or informal manner (whether pursuant to law or under warranties, covenants, conditions, representations or promises from the borrower) by which the holder acquires title to or possession of the secured property;

(8) "Holder" is a person who maintains indicia of ownership primarily to protect a security interest. A holder includes the initial holder or purchaser (such as a loan originator), any subsequent holder (such as a successor-in-interest or subsequent purchaser of the security interest on the secondary market), any subsequent assignee, transferee or purchaser from a holder, a guarantor of an obligation, surety, or any other person who holds ownership indicia primarily to protect a security interest, or a receiver or other person who acts on behalf or for the benefit of a holder;

(9) "Indicia of ownership" means evidence of a security interest, evidence of an interest in a security interest, or evidence of an interest in real or personal property securing a loan or other obligation, including any legal or equitable title to real or personal property acquired incident to foreclosure and its equivalents. Evidence of such interests include, but are not limited to, mortgages, deeds of trust, liens, surety bonds and guarantees of obligations, title held pursuant to a lease financing transaction in which the lessor does not select initially the leased property (herein "lease financing transaction"), legal or equitable title obtained pursuant to foreclosure, and their equivalents. Evidence of such interests also includes assignments, pledges, or other rights to or other forms of encumbrance against property that are held primarily to protect a security interest. A person is not required to hold title or a security interest in order to maintain indicia of ownership;

(10) "Primarily to protect a security interest" means that the holder's indicia of ownership are held primarily for the purpose of securing payment or performance of an obligation, but does not include indicia of ownership held primarily for investment



purposes, nor ownership indicia held primarily for purposes other than as a protection of a security interest. A holder may have other, secondary reasons for maintaining indicia of ownership, but the primary reason why ownership indicia are held shall be for protection of a security interest.;

(11) "Security interest" means an interest in a site, vessel or facility created or established for the purpose of securing a loan or other obligation. Security interests include, but are not limited to, mortgages, deeds of trust, liens, and title pursuant to lease financing transactions. Security interests may also arise from transactions such as sale and leasebacks, conditional sales, installment sales, trust receipt transactions, certain assignments, factoring agreements, accounts receivable financing arrangements, inventory and/or other personal property financing arrangements and consignments, if the transaction creates or establishes an interest in a site, vessel or facility for the purpose of securing a loan or other obligation.

(12) "Vessel" means every description of watercraft or other artificial contrivance used, or capable of being used as a means of transportation on water.

SECTION 5. Indicia of ownership generally-A person who maintains indicia of ownership of a site, vessel or facility primarily to protect a security interest in a site, vessel or facility, and who does not participate in the management of the site, vessel or facility is not an owner or operator of the site, vessel or facility , shall not be deemed the discharger or responsible party for a discharge from the site, vessel or facility and shall not be liable for cleanup cost or damages resulting from discharge from the site, vessel or facility pursuant to this chapter, except to the extent that liability may still apply to holders after foreclosure as set forth in section six. The plaintiff or petitioner bears the burden of establishing that the defendant or respondent is liable as an owner or operator.

SECTION 6. Indicia of ownership after foreclosure- The indicia of ownership, held after foreclosure continues to be maintained primarily as a protection for a security interest provided

that the holder did not participate in the management prior to foreclosure and its equivalents and that the holder undertakes to sell, re-lease property pursuant to a lease financing transaction (whether by a new lease financing transaction or substitution of the lessee), or otherwise divest itself of site, vessel or facility in a reasonably expeditious manner in accordance with the means and procedures specified in this part. Such a holder may liquidate, maintain business activities and operations, wind up operations, undertake environmental response actions pursuant to state, local, and federal laws, and take measures to preserve, protect or prepare the secured asset prior to sale or other disposition, without losing status as a person who maintains indicia of ownership primarily to protect a security interest pursuant to this chapter;

(a) For the purposes of establishing that a holder is seeking to sell, re-lease property pursuant to a new lease financing transaction (whether by a new lease financing transaction or substitution of the lessee), or divest itself of a site, vessel or facility in a reasonably expeditious manner, the holder may use whatever commercially reasonable means are relevant or appropriate with respect to the site, vessel or facility, taking all facts and circumstances into consideration, or may employ the means specified in this part;

(b)(1) A holder that outbids, rejects or fails to act upon a written bonafide, firm offer of fair consideration within ninety (90) days of receipt of the offer, provided the offer is received at any time after six (6) months following the date of foreclosure and its equivalents, shall not be deemed to be using a commercially reasonable means for the purpose of this part. A "written bonafide, firm offer" means a legally enforceable, commercially reasonable, cash offer solely for the foreclosed site, vessel or facility, including all material terms of the transaction, from a ready, willing, and able purchaser who demonstrates to the holder's satisfaction the ability to perform. For the purpose of this subsection, the six (6) month period begins to run from the time that the holder

acquires a marketable title, provided that the holder, after the expiration of any redemption or other waiting period provided by law, was acting diligently to acquire marketable title;

(2) A holder that outbids, rejects, or fails to act upon an offer of fair consideration for the site, vessel or facility as provided in subsection (b)(1), establishes that the ownership indicia in a secured property are not held primarily to protect the security interest, unless the holder is required, in order to avoid liability under federal, state or local law, to make a higher bid, to obtain a higher offer, or to seek or obtain an offer in a different manner;

(c) A holder establishes that it is proceeding in a commercially reasonable manner after foreclosure by , within twelve (12) months following foreclosure and its equivalents, listing the site, vessel or facility with a broker, dealer, or agent who deals with the type of property in question, or by advertising the site, vessel or facility as being for sale or disposition on at least a monthly basis in either a real estate publication or a trade or other publication suitable for the site, vessel or facility in question, or a newspaper of general circulation (defined as one with a circulation over 10,000, or one suitable under any applicable federal, state or local rules of court for publication required by court order or rules of civil procedure) covering the area where the property is located. For purposes of this subsection, the twelve (12) month period begins to run from the time that the holder acquires marketable title, provided that the holder, after the expiration of any redemption or other waiting period provided by law, was acting diligently to acquire marketable title;

(d) A holder shall sell, re-lease the property held pursuant to a new lease financing transaction, or otherwise divest itself of such site, vessel or facility in a reasonably expeditious manner, but not later than five (5) years after the date of foreclosure or its equivalents, except that a holder may continue to hold the property for

a time period longer than five (5) years without losing status as a person who maintains indicia of ownership primarily to protect a security interest if; (1) the holder has made a good faith effort to sell, re-lease, or otherwise divest itself of the property using commercially reasonable means or other procedures prescribed by this act; (2) the holder has obtained any approval required pursuant to applicable federal, state or local banking or other lending laws to continue its possession of the property; or (3) the holder has exercised reasonable custodial care to prevent or mitigate any new discharges from the site, vessel or facility that could substantially diminish the market value of the property;

(1) The exemption granted to holders pursuant to this section shall not apply to the liability for any new discharge from the site, vessel or facility, occurring after the date of foreclosure and its equivalents, that is caused exclusively by acts or admissions of the holder which can be shown, based on a preponderance of the evidence, to have been negligent. In the event a property has both preexisting and new discharges, the liability, if any, allocable to the holder pursuant to this subsection shall be limited to those clean up costs or damages that relate directly to the new discharge. In the event there is a substantial co-mingling of new discharge with preexisting discharge, the liability if any, allocable to the holder pursuant to this subsection shall be limited to the cleanup costs or damages in excess of those cleanup costs or damages relating to a preexisting discharge. In order to establish that a discharge occurred or began prior to the date of foreclosure and its equivalents, a holder may perform, but shall not be required to perform, an environmental audit, site assessment or inspection, in accordance with the Assessment Standards, to identify such discharges at the site, vessel or facility;

(2) Nothing in the subsection shall be deemed to impose liability for a new discharge from the site, vessel or facility that is authorized pursuant to a federal, state or local permit or cleanup procedure;

(3) The exemption granted to holders of indicia of ownership primarily to protect a security interest shall not apply to liability, if any, pursuant to applicable laws and regulations, for arranging for the off site disposal or treatment of a hazardous substance, or by accepting for transportation and disposing of a hazardous substance at an off site facility selected by the holder, unless pursuant to a remediation plan approved by the appropriate local, state and/or federal authorities.

#### SECTION 7.

(a) Nothing in this part shall be deemed to prohibit or limit the rights of the Department to clean up sites or to obtain a lien on sites, pursuant to Tennessee Code Annotated, Section 68-212-209;

(b) Nothing in this part shall be deemed to prohibit or limit the rights of the Department to direct the holder to take any emergency response actions including closure of the site, vessel or facility necessary to prevent, contain or mitigate a continuing or new discharge that poses an immediate threat to the environment or the public health, safety or welfare;

SECTION 8. Nothing in this part shall be construed to require a holder of a security interest to conduct or require an environmental inspection, audit or assessment and the liability of the holder of the security interest shall not be based on or affected by a failure to conduct an environmental inspection, audit or assessment.

SECTION 9. No state or local governmental agency or entity shall adopt any rule, regulation, ordinance, policy or permit condition circumventing or limiting exemptions or protections established by this act, or the exercise of said exemptions and protections.

SECTION 10. Tennessee Code Annotated, Section 68-215-117, is amended by adding the following as a new section (c) and redesignating existing sections accordingly:

"(c) A person shall not be liable under this chapter who establishes, by a preponderance of the evidence, that (1) he or she acquired title to an underground

storage tank facility after the installation or placement of underground storage tanks on, in, or at the facility, (2) at the time the person acquired the title to the underground storage tank or facility which is subject to the provisions of the Chapter was installed or placed on, in, or at the site, or that a release of a petroleum substance from such tank(s) into the environment had occurred and (3) the person exercised due care with respect to the underground storage tank facility or petroleum substances concerned, taking into consideration the characteristics of such facility and petroleum substances, in light of all relevant facts and circumstances. To establish that he or she had no reason to know of the presence of any underground storage tank or facility or of the release of a petroleum substance into the environment, the standards set forth in Tennessee Code Annotated, Title 68, Chapter 212."

SECTION 11. Nothing in this act shall be construed to limit or reduce the protection from liability for an inactive hazardous waste site or underground storage tank facility afforded to trustees, or other fiduciaries, under Tennessee Code Annotated, Section 35-50-110 (32), any other applicable statute, or common law exemptions or protections.

SECTION 12. This act shall take effect upon becoming a law, the public welfare requiring it.

AN ACT relative to hazardous waste management and underground storage facilities and to amend Tennessee Code Annotated, Title 68.

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